

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL MITCHELL,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 261372

Wayne Circuit Court

LC No. 04-011670-01

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant was convicted of two counts of assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 16 to 30 years in prison on each assault with intent to rob while armed conviction, three to five years in prison on the felon in possession of a firearm conviction, and two years in prison on the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first claims that it was plain error for the trial court to fail to sua sponte suppress officer Robert Fitzgerald's in-court identification testimony. While we agree that the issue is at least arguable, we find that any error in admitting this testimony did not prejudice defendant.

Defendant failed to properly preserve this issue by making a motion to suppress the identification testimony or by moving for a hearing regarding the suggestiveness of the pretrial identification procedure. *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). Therefore, we review defendant's claim for plain error that affected his substantial rights, and merits reversal only if defendant is actually innocent or the alleged error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999).

There is no question that Officer Fitzgerald's identification of defendant at trial was suspect. He could not identify defendant when he was shown photographs of six individuals at the hospital after the shooting. At the preliminary examination, Fitzgerald did not identify defendant, and testified that he did not see the culprit "well enough" to recognize him if he saw him again.

During Fitzgerald's trial testimony, he gave a general description of defendant and testified that he did not get a good look at defendant's face. Yet, at trial, Fitzgerald testified that while he did not identify defendant at the preliminary examination, he recognized defendant at the preliminary examination after he saw defendant's eyes again and that he told the "investigator" this after his preliminary examination testimony. There was no corroboration of this conversation with the unnamed investigator. It is worth noting that at the time of Fitzgerald's trial testimony it was unclear whether the main witness against defendant, who was able to unequivocally identify defendant as the shooter, would be available to testify. It was only later in the trial that she was produced and testified against defendant. There does not appear to be any independent basis for Fitzgerald's identification at trial, having failed to identify defendant anytime prior to trial even though he had an opportunity to do so at the preliminary examination, and before the preliminary examination at the photo line-up conducted at the hospital.

However, Fitzgerald's identification testimony, no matter how suspect, even if excluded, does not entitle defendant to any relief. The second victim of the armed assault, eyewitness Menta Boone, testified that she knew who defendant was because she used to buy drugs from him. Her identification of defendant as the man with the shotgun was unequivocal. Boone stated that she noticed that defendant was the man who was holding a shotgun in his hand as soon as he approached the vehicle. Boone stated that defendant pointed his shotgun at Fitzgerald's face and demanded money from Fitzgerald. Boone reiterated that there was no doubt in her mind that defendant was the man who approached the vehicle with a shotgun in his hand, and subsequently pointed the shotgun at Fitzgerald's face and demanded money from him. Perhaps most telling is that in his own testimony at trial, defendant confirmed that Boone knew him well because she used to buy drugs from him. Thus, we conclude that any error in failing to sua sponte suppress Fitzgerald's in-court identification testimony did not prejudice defendant and, indeed, was harmless beyond a reasonable doubt.

Defendant next argues that he was denied his right to the effective assistance of counsel when defense counsel failed to object to Fitzgerald's in-court identification of defendant. We disagree. Defendant failed to properly preserve this issue by raising a motion for a new trial or an evidentiary hearing. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004), overruled on other grounds 474 Mich 48 (2006). When reviewing an unpreserved claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Here, as noted, Fitzgerald's in-court identification of defendant was at least arguably improper. Accordingly, defense counsel should have objected to the identification. Because defense counsel failed to object to the identification, we conclude that his performance fell below an objective standard of reasonableness. However, based on Boone's testimony, we conclude that an objection to Fitzgerald's in-court identification of defendant would not have changed the result of the proceedings. Therefore, defendant has not established that he was denied his right to the effective assistance of counsel. *Toma, supra* at 302-303.

Defendant's final issue on appeal is that there was insufficient evidence presented to support his assault with intent to rob while armed, felon in possession of a firearm, and felony-firearm convictions. We disagree. When reviewing a claim that the evidence was insufficient to support the defendant's convictions, we review the evidence presented in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crimes charged were proven beyond a reasonable doubt. We must afford deference to the jury's special opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992).

"The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Here, Boone testified that she knew who defendant was because she used to buy drugs from him. Boone stated that she noticed that defendant was the man who was holding a shotgun in his hand as soon as he approached the vehicle. Boone stated that defendant pointed his shotgun at Fitzgerald's face and demanded money from Fitzgerald. Fitzgerald testified that the man with the shotgun demanded money or he would shoot him, and when Fitzgerald retrieved his own weapon, the two exchanged gunfire with the result that both Fitzgerald and Boone were wounded. Furthermore, defendant confirmed during his own trial testimony that Boone knew him well because she used to buy drugs from him.

Defendant's testimony to the contrary is to no avail. We must afford deference to the jury's special opportunity and ability to determine the credibility of the witnesses. *Wolfe, supra* at 514-515. Therefore, viewing the evidence presented in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of assault with the intent to rob while armed were proven beyond a reasonable doubt, and there was sufficient evidence presented to support defendant's assault with intent to rob while armed conviction.

Furthermore, this Court has interpreted MCL 750.227b to require the prosecution to show "that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Since, as discussed, *supra*, the evidence was sufficient to persuade a rational trier of fact that the elements of assault with intent to rob while armed were proven beyond a reasonable doubt and to establish that defendant possessed a firearm during the commission of that felony, sufficient evidence was provided to persuade a rational trier of fact that the elements of felony-firearm have been met. *Id.* Moreover, to convict a defendant of felon in possession of a firearm, in relevant part, the prosecution must establish that a defendant, who had been previously convicted of a specified felony and was not allowed to possess a firearm for a specified amount of time, possessed a firearm within that specified amount of time. MCL 750.224f. Here, the parties stipulated that defendant had been previously convicted of a felony and was not allowed to possess a firearm at

the time of the incident in question and, as discussed, *supra*, the evidence presented established that defendant possessed a firearm during the incident in question. Therefore, sufficient evidence was provided to persuade a rational trier of fact that the elements of felon in possession of a firearm have been met. MCL 750.224f.

Affirmed.

/s/ Jessica R. Cooper

/s/ Janet T. Neff

/s/ Stephen L. Borrello